STATE OF MICHIGAN

IN THE SUPREME COURT

On Application for Leave to Appeal from the Michigan Court of Appeals
Hon. Kurtis T. Wilder, Hon. William B. Murphy, Hon. Peter D. O'Connell

GRASS LAKE IMPROVEMENT BOARD,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellee.
_____/

Supreme Court No. 154364

Court of Appeals No. 326571
30th Circuit Court No. 2014-1064-AA
Hon. William E. Collette

MAHS Case No. 09-63-0026-P

PETITIONER-APPELLANT GRASS LAKE IMPROVEMENT BOARD'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals' published decision is clearly erroneous and will cause a material injustice because the MDEQ's position that it was not required to follow its own duly promulgated rule was always devoid of arguable legal merit where no conflict or tension in the law exists between Mich Admin Code R 281.811(1)(e) and MCL 324.30101, which can be read in harmony and given their plain meaning, and, therefore, the Court of Appeals should have affirmed the decision of the Ingham County Circuit Court that Grass Lake Improvement Board is entitled to recover its wrongfully incurred attorney fees?

Petitioner-Appellant's Answer:	Yes
Respondent-Appellee's Answer:	No
The Circuit Court would answer:	Yes
The Court of Appeals would answer:	No
This Court should answer:	Yes

2. Whether under MCR 7.305(B)(5)(b) the Court of Appeals published decision can be interpreted as contrary to over 30 years of well-established case law because the Court of Appeals wrongly held the MDEQ position that it need not follow its own duly promulgated rules where it can unilaterally claim that it need not follow its rules because of a claimed conflict between the rule and statute?

Petitioner-Appellant's Answer:	Yes
Respondent-Appellee's Answer:	No
The Circuit Court would answer:	Yes
The Court of Appeals would answer:	No
This Court should answer:	Yes

INTRODUCTION

Petitioner-Appellant Grass Lake Improvement Board ("GLIB") requests that this Court enter a peremptory order (1) reversing and vacating the published decision of the Court of Appeals; (2) finding that GLIB is entitled to its attorney fees and costs under MCL 24.323 incurred up to the conclusion of this case, including any future hearings on remand as order by this Court; and (3) reinstating the March 3, 2015, Opinion and Order of the Ingham County Court subject to a remand to the Administrative Law Judge ("ALJ") limited to an evidentiary hearing solely regarding the reasonableness of the fees and costs incurred by GLIB. In the alternative, GLIB requests that this court grant its application for leave to appeal.

The Court of Appeals published decision in this case is problematic and is indeed contrary to more than 30 years of well-settled law. The Court of Appeals acknowledged that it is "well-settled . . . that agencies are bound to follow their own duly promulgated rules." *Grass Lake Improvement Board v Department of Environmental Quality*, 316 Mich App 356, 366; 891 NW2d 884 (2016). As discussed in more detail below, the MDEQ had no jurisdiction to determine the validity of its own rules – only the circuit courts are vested with the jurisdiction to make such determinations. The Court of Appeals decision will be interpreted as allowing the MDEQ and other agencies to determine the validity of their rules and, further, permitting agencies to ignore their rules. The decision must be reversed as contrary to well-established law to effectuate public trust in the regulatory process.

No meaningful disagreement exists in the facts and procedural history in this matter. GLIB prevailed in the underlying contested case and is now seeking to be made somewhat whole for the fees and costs wrongly incurred. The ALJ and the MDEQ Director determined that the

MDEQ must follow its own duly promulgated rules and may not apply the related statutory provision in an ad hoc fashion. The only issue remaining is whether the MDEQ's position was void of arguable legal merit and whether the ALJ abused his discretion in the denying the request for fees. The MDEQ asserts that there is a conflict between the statute and the Rule. GLIB asserts that the statute and Rule are harmonious. However and importantly, even if a conflict existed, the applicable law requires agencies to follow their duly promulgated rules and, further, the resolution of conflicts is a judicial function – not an agency function.

These are the relevant issues. Under the applicable standard, there was only one reasonable and principled outcome – the position of the MDEQ was void of arguable legal merit.

GLIB has fully briefed the substantive issues before this Court. Accordingly, GLIB will only provide further support for and emphasis to the following issues:

1. The standard of review on appeal for attorney fees;

2. The unambiguous law requires an agency to follow its own duly promulgated rules; and

3. Although no conflict or tension exists between the administrative rule and the statute, the resolution of statutory conflicts remains a judicial function and does not permit an agency to apply its rules in an arbitrary manner.

I. STANDARD OF REVIEW

The applicable standard of review for an award of fees and costs is set forth in MCL 24.325 (2) which provides:

> (2) The court reviewing the final action of a presiding officer pursuant to subsection (1) may modify that action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion, or that the calculation of the amount of the award was not based on substantial evidence.

The "abuse of discretion" standard is not nearly as onerous as the MDEQ has asserted in its Response Brief. There, the MDEQ claims that the standard to reverse an administrative agency is set forth in *In re Kurzyniec Estate v Social Servs*, 207 Mich App 531, 537 (1994). However, *In re Kurzniec Estate* involved an entirely different statutory. More recently in administrative cases, the standard for review of abuse of discretion has been described by this Court as follows:

> "The abuse-of-discretion standard recognizes that there will be circumstances in which there will be more than one reasonable and principled outcome, and selection of one of these principled outcomes is not an abuse of discretion."

Grimm v. Dep't. of Treasury, 291 Mich. App. 140, 149; 810 N.W.2d 65 (2010), citing *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 388; 719 N.W.2d 809 (2006).

In *Maldonado v. Ford Motor Co.*, this Court stated:

> [T]his Court noted that an abuse of discretion standard must be one that is more deferential than review de novo, but less deferential than the standard set forth in *Spalding v. Spalding*, 355 Mich. 382, 94 N.W.2d 810 (1959). This Court stated that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." [*People v Babcock*, 469 Mich 247, 269; 666 N.W.2d 231 (2003)]. The *Babcock* Court further noted that "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*. While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard.

See also *Maier v. Maier*, 311 Mich App 218; 874 NW2d 725 (2015), characterizing *Maldonado* as the "default" standard for abuse of discretion.

Under this standard, there simply is only one reasonable and principled outcome in this case. The MDEQ's arbitrary and capricious flip flop in applying its own Rule regarding what constitutes "enlargement" of a lake, by asserting the Rule had limitations in the *Nestle Waters*

case[1] and then taking a contrary position in this matter, demonstrates that the MDEQ's position was both subjectively and objectively void of arguable legal merit. There simply is no other "principled outcome" – the MDEQ promulgated a rule and chose to apply it one case and not another. Therefore, the only reasonable and principled outcome is that the MDEQ's position was frivolous as void of arguable legal merit.

II. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY ASSERTING THAT THERE IS "TENSION" BETWEEN THE STATUTE AND THE RULE.

There is no "tension" between MCL 324.30102(1)(b) (that requires a permit for enlargement activities) and Rule 281.811(1)(e) (that provides the specific definition of "enlargement"). Contrary to the position of the MDEQ, the statute and rule can and must be read together and provided their plain meaning to effectuate public trust in the regulatory process.

The MDEQ's position in the underlying case was devoid of arguable legal merit under MCL 24.323(1)(c). The MDEQ had the unilateral right to promulgate rules defining "enlargement." It was not required to promulgate a rule – but it did so. Once it did so, the arbitrary decision to not following the Rule was void of arguable legal merit. This is particularly true where, as here, the MDEQ promulgated the Rule regarding enlargement and, during the course of the litigation, it attempted to change the Rule. Given these facts and the the supporting case law, the Court of Appeals should have affirmed the decision of the Ingham County Circuit Court.

The MDEQ asserts that the language in *Micu v City of Warren*, 147 Mich App 573, 584; 382 NW2d 823, 828 (1985) that provides that an agency must follow its own promulgated rule or otherwise change its rule is merely dicta. However, Michigan courts have stated again and again

[1] *Michigan Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, Court of Appeals docket # 254202. See GLIB Application for Leave to Appeal, **Exhibit H** at 13-14; 17-18.

that once an agency has issued rules and regulations to govern its activity, it may not violate them. See *De Beaussaert v Shelby Twp*, 122 Mich App 128, 129, 333 NW2d 22 (1982); *Golembiowski v Madison Heights Civil Service Comm*, 93 Mich App 137, 148, 286 NW2d 69, 74 (1979), lv den 408 Mich 893 (1980); *Brown v. Dep't of State Police*, 392 Mich 811 (1974). See also *Peterson v. Dep't of Natural Resources*, 392 Mich 68, 75-76, 219 NW2d 34 (1974) (The promulgation of civil service rules is designed to prevent state agencies, and the Commission itself, from exceeding their authority and acting arbitrarily. Allowing subordinate entities as they encounter specific situations to develop usages regarding fundamental matters, not formally promulgated, is inconsistent with the purpose of advance rule making); *Hanks v. Department of Social Services*, 169 Mich. App. 512, 426 N.W.2d 759 (1988) (Once a state agency has issued a rule, it may not violate that rule. Citing *Semaan v. Liquor Control Comm.*, 425 Mich. 28, 37, 387 N.W.2d 786 (1986)).

The principle enunciated in *Micu* is hardly dicta, but rather black letter law. The language from *Micu* stating that an agency must follow its own rules or it must change the rule is no different from the long line of Michigan cases providing that an agency may not violate its own rules. If an agency may not violate its own rule, it naturally follows that if an agency wishes to take a position contrary to its rule, it must change its rule.

It is also worth noting that other jurisdictions have uniformly recognizing this same principle. For example, in *In re CAFRA Permit No. 87-0959-5*, 152 NJ 287, 308; 704 A2d 1261 (1997), the Supreme Court of New Jersey stated:

> In general, an administrative agency should follow its own rules and regulations. If an agency wants to amend a rule or regulation, it may do so expressly after providing notice and a hearing. NJSA 52:14B–5. Similarly, an agency that seeks the power to waive its substantive regulations should adopt a regulation pertaining to any such waiver and setting forth appropriate standards to govern agency decision-making. *Absent such a regulation, applicants, interested parties, and*

> *others may not know the rules of the game*. The agency, moreover, opens itself to attack on the grounds that it did not have the implicit power to waive a substantive regulation. (Emphasis added).

In support, the New Jersey Supreme Court cited to the following cases from New Jersey, other jurisdictions (including Michigan) and secondary sources: [2]

> Absent a regulation providing for waiver, a question arises whether an agency may waive its substantive regulations. See *County of Hudson v. Department of Corrections*, 152 N.J. 60, 71–73, 703 A.2d 268 (1997) ("Absent a statute or regulation authorizing the waiver of otherwise valid and enforceable administrative regulations, an agency generally should not waive its own duly-enacted regulations by disregarding them."); *Dougherty v. Department of Human Servs*., 91 N.J. 1, 8, 12, 449 A.2d 1235 (1982) (reversing Appellate Division's waiver of agency's reimbursement regulation on grounds that agency should first consider waiver); *Texter v. Department of Human Servs*., 88 N.J. 376, 383, 443 A.2d 178 (1982) (noting that administrative agencies possess wide discretion in authority to select means and procedures by which to meet their statutory objectives); *Iuppo v. Burke*, 162 N.J.Super. 538, 550–52, 394 A.2d 96 (App.Div.1978), certif. denied, 79 N.J. 462, 401 A.2d 219 (1978) (holding that Commissioner was bound by Board of Education's regulation requiring him to classify schools and that he improperly suspended regulation without formal amendment procedures, but denying affirmative remedy); see also *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 503, 98 L.Ed. 681 (1954) (holding that, as long as regulation empowering Board of Immigration Appeals to exercise discretion in individual cases remained operative, the Attorney General "denies himself the right to sidestep the Board or dictate its decision in any manner"); *United States v. Nixon*, 418 U.S. 683, 695, 94 S.Ct. 3090, 3101, 41 L.Ed.2d 1039 (1974) (holding that, as long as regulation giving Special Prosecutor authority to contest invocation of executive privilege remained in force, Executive Branch was bound to it); *Clean Ocean Action v. York*, 57 F.3d 328, 333 (3rd Cir.1995) (agency is bound by express terms of its regulations until it amends or revokes them); *Gray Lines Tour Co. v. Interstate Commerce Comm'n*, 824 F.2d 811, 814 (9th Cir.1987) (while agency must ordinarily follow its own rules and regulations, "it can alter previously announced policies, or fashion exceptions, if it reasonably explains the alteration"); *Cleveland Clinic Florida Hosp. v. Agency for Health Care Admin*., 679 So.2d 1237, 1242 (Fla.App.Ct.1996), (holding that, "without question," agency must follow own rules; if rule proves impractical, it can be amended pursuant to established rulemaking procedures) appeal denied, 695 So.2d 701 (Fla.1997); *Springwood Assocs. v. Health Facilities Planning Bd.*, 269 Ill.App.3d 944, 207 Ill.Dec. 287, 289, 646 N.E.2d 1374, 1376 (1995), appeal denied, 163 Ill.2d 589, 212 Ill.Dec.

[2] GLIB recognizes that long string citations are disfavored and should be avoided. However, the direct quote from the New Jersey Supreme Court is provided to highlight that other jurisdictions (if not all jurisdictions) recognize the axiomatic rule enunciated in these cases.

> 438, 657 N.E.2d 639 (1995) ("Generally, administrative agencies must follow their own rules as written, without making ad hoc exceptions or departures therefrom in adjudicating."); *Greenberg v. Secretary of Dep't of Revenue & Taxation*, 416 So.2d 205, 207 (La.Ct.App.1982) (holding that, while administrative agency could change rules via proper procedure, it cannot waive, suspend, or modify its own rules and regulations "absent special circumstances"); *Salaam v. Commissioner*, 43 Mass.App.Ct. 38, 680 N.E.2d 941, 944 (1997) (holding that government agency must respect its own regulations "as long as they exist on the books"); *Micu v. City of Warren*, 147 Mich.App. 573, 382 N.W.2d 823, 828 1985) (once promulgated, rules may not be violated or waived by agency that issued them); *Eastwood Bldg. Comm. v. Berman*, 118 Misc.2d 494, 461 N.Y.S.2d 184, 185 (Sup.Ct.1983) ("While an agency may sometimes waive its own rules 'in the interests of justice,' it certainly may not do so where the substantive rights of individuals are prejudiced."); *Lyden Co. v. Tracy*, 76 Ohio St.3d 66, 666 N.E.2d 556, 559 (1996) (acknowledging that administrative agencies are bound by own rules until duly changed); 2 Kenneth C. Davis, Administrative Law Treatise § 7:21 (2d ed. 1979 & Supp 1989) (concluding legislative rules are "clearly" binding on issuing agency because valid legislative rules have the effect of a statute); 1 Charles H. Koch, Jr., Administrative Law and Practice § 3.73 (1985 & Supp 1997) (concluding that agency generally must follow its own legislative rules).
>
> *In re CAFRA Permit No. 87-0959-5*, 152 NJ at 306-307.

This exhaustive citation regarding the underlying axiom described by the New Jersey Supreme Court that applicants and other interested parties must know the rules of the game highlights the fact that when the MDEQ's arbitrarily raised the bar on GLIB, it took a position void of arguable legal merit. MDEQ has failed to provide any support for the notion that it may not follow its own Rule. The Court of Appeals decision has the practical effect of allowing an administrative agency to apply a rule as it deems fit. This is contrary to law and the Court of Appeals decision must be reversed.

III. THE COURT OF APPEALS WRONGLY APPLIED A JUDICIAL STANDARD TO THE REQUIREMENT THAT AN AGENCY MUST FOLLOW ITS OWN DULY PROMULGATED RULE

The Court of Appeals engaged in an analysis of what it characterized as "tension" between the statute and the Rule. However, this analysis was misplaced and unnecessary. The

relevant inquiry is not whether there was tension between the statute and the Rule, which there was not. The inquiry is whether the MDEQ may make its own determination of the validity of its own Rule. The promulgation of the Rule restricted the jurisdiction of the MDEQ to its own definition of enlargement to those activities involving the bottomland of the lake. That is a choice made by the MDEQ in the promulgation of the Rule. A Rule may restrict jurisdiction but cannot expand jurisdiction. There is no statutory authority for the MDEQ to determine the substantive validity of its own Rules. Validity of rules are determined by the circuit court. *Michigan Farm Bureau v. Dep't of Environmental Quality*, 292 Mich.App. 106, 119 fn 7; 807 N.W.2d 866 (2011); *Dykstra v Director, Dep't of Natural Resources*, 198 Mich App 482; 499 NW2d 367 (1993). If the Legislature has properly delegated the rulemaking authority, then the only question before the court is whether the agency "has exceeded its authority granted by the statute." *In re Complaint of Rovas*, 482 Mich 90, 101; 754 NW2d 259 (2008).

In the present case, the MDEQ made a judicial determination regarding the validity of its Rule. The MDEQ does not assert that the Rule is ambiguous. The statute does not define the word "enlarge" while the Rule does. This fact does not create a conflict and the MDEQ may not determine that its Rule is invalid – that is a judicial function. Since the MDEQ may not ignore its own rules and may not sit as its own circuit court to determine the validity of the Rule, MDEQ must accept its Rule as promulgated. It did not and its unilateral determination to attempt exercise judicial authority to determine the validity of the Rule lacked arguable legal merit.

CONCLUSION AND RELIEF REQUESTED

The MDEQ's legal position was void of arguable legal merit. Administrative agencies may not apply their duly promulgated rules in an *ad hoc* fashion and certainly may not make judicial determinations regarding the validity of their rules. Under any standard, there is a

significant public interest in the MDEQ's vast regulatory power and in fact a necessity that agencies under all circumstances and at all times follow the rules and procedures which they have promulgated so that the public can rely on the process that is promised.

Therefore, Grass Lake Improvement Board respectfully requests that this Court enter a peremptory order (1) reversing and vacating the published decision of the Court of Appeals; (2) finding that GLIB is entitled to its attorney fees and costs under MCL 24.323 incurred up to the conclusion of this case, including future hearings on remand as ordered by this Court; and (3) reinstating the March 3, 2015, Opinion and Order of the Ingham County Court subject to a remand to the Administrative Law Judge ("ALJ") limited to an evidentiary hearing solely regarding the reasonableness of the fees and costs incurred by GLIB. In the alternative, GLIB requests that this court grant its application for leave to appeal.

Respectfully submitted,

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Dated: August 2, 2017

CERTIFICATE OF SERVICE

I state that on August 2, 2017, the foregoing Petitioner-Appellant Grass Lake Improvement Board's Supplemental Brief in Support of Application for Leave to Appeal, was filed with the Court via the ECF system, and served upon all attorneys of record via United States Mail and electronic mail.

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